RAJA SINGAM VELU

v.

AFFIN-ACF FINANCE BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
JOHN LOUIS O'HARA J
[SUIT NO: S-21-295-2005]
13 DECEMBER 2011

CIVIL PROCEDURE: *Appeal - Appeal against decision of Senior Assistant Registrar - Notice of taxation of costs - Whether defendants failed to produce necessary documentation - Rules of the High Court 1980, O. 59 r. 20 - Whether there was non-compliance of - Defendants filed notice of taxation of costs - Preliminary objection that defendants did not produce necessary documentation*

CIVIL PROCEDURE: *Costs - Taxation - Notice of taxation of costs - Filing of - Whether defendants failed to produce necessary documentation - Rules of the High Court 1980, O. 59 r. 20 - Production of necessary - Whether directory and not mandatory*

The 1st, 2nd and 3rd defendants' ('the defendants') in this case had filed a Notis Penetapan Kos ('encl. 90') seeking to tax the defendants' costs. During the hearing before the Senior Assistant Registrar ('SAR'), the plaintiff raised a preliminary objection that the defendants had failed to produce a copy of the Bill of Costs together with the necessary papers and vouchers and were not in compliance with O. 59 r. 20 of the Rules of the High Court 1980 ('O. 59 r. 20'). It was argued by the plaintiff that the word 'must' in O. 59 r. 20 should be construed as 'shall' thereby denoting its mandatory nature. The SAR had struck out encl. 90 and the defendants appealed against the said decision.

Held (allowing appeal; reversing SAR's decision with costs):

(1) Order 59 r. 20 does not stipulate as to the timeline for the production of the 'copy thereof with all necessary papers and vouchers'. Therefore, the purposive interpretation of these words would mean that they are to be produced as and when necessary. It was thus directory and not mandatory and the deliberate insertion of the word 'necessary' emphasised the

A directory nature of the order and denoted a discretion vested in the party wishing to tax his costs. *(Sarjit Singh Khaira v. Government of Sarawak)* (paras 8-11)

(2) As there were a total of 256 items listed for taxing, as per the B Bill of Costs, it would be impractical for the defendants to furnish all the said items as it was only necessary to do so if the plaintiff were to dispute any particular and specific item in the Bill of Costs. (para 14)

Case(s) referred to:
C *Bank Simpanan Nasional v. Abdul Mutalib Mohd Salleh [2005] 7 CLJ 1 HC **(refd)***
*Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA **(refd)***
Grandeur Holdings Sdn Bhd v. Chong Kim Leong & Anor [2005] 4 CLJ 700 D *HC **(refd)***
*Procam (Pte) Ltd v. Charles Jocelyn Tichborne Nangle & Anor [1990] 4 MTC 208 **(refd)***
*Sarjit Singh Khaira v. Government of Sarawak [1996] 1 CLJ 349 HC **(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 E *CLJ 716 SC **(refd)***
*Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad [1996] 1 CLJ 241 FC **(refd)***

Legislation referred to:
F Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 59 r. 20

Other source(s) referred to:
Dato Kamalanathan Ratnam, *Taxation of Costs*, [1998] 1 MLJ xli, p 1viii

For the plaintiff - Venu Nair (Raja Singam with him); M/s Raja Singam & G *Co*
For the defendants - Justin Voon (Anson Liang with him); M/s Sidek Teoh Wong & Dennis

Reported by Baizura Abd Razak

H **JUDGMENT**

John Louis O'hara J:

Introduction

I **[1]** This matter came before me as the hearing of the 1st, 2nd and 3rd defendants' appeal (encl. 92) against the decision of the senior assistant registrar dated 17 June 2011 in which she allowed the plaintiffs' preliminary objection (PO) and struck out the 1st, 2nd and 3rd defendants' notis penetapan kos (encl. 90).

The Appeal

[2] In the hearing of an appeal of this nature from the decision of a SAR to a judge-in-chambers, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the Subordinate Courts. Such appeals from decisions of the SAR are by way of an actual re-hearing and the judge treats the matter as though it comes before him for the first time. Per Edgar Joseph FCJ in *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad* [1996] 1 CLJ 241 and *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716.

[3] I allowed encl. 92 and the plaintiff now appeals against my decision.

The Factual Matrix

[4] Enclosure 90, filed by the 1st, 2nd and 3rd defendants, is dated 21 September 2010. It seeks to tax the 1st, 2nd and 3rd defendants' costs based on the following orders handed down by the court against the plaintiff in regard to:

a) Enclosure 35,

b) Enclosure 34,

c) Enclosure 43,

d) Enclosure 35A,

e) Enclosure 62,

f) Enclosure 3,

g) Enclosure 5,

h) Enclosure 55, and

i) Enclosure 72.

[5] During the hearing before the SAR, the plaintiff raised a PO that the defendants did not produce a copy of the Bill together with all necessary papers and vouchers and were not in compliance with O. 59 r. 20 of the Rules of the High Court 1980, and therefore encl. 90 ought to be struck out.

The Law

[6] Order 59 r. 20 provides as follows:

A party entitled to require any costs to be taxed must begin proceedings for the taxation of those costs by producing at the Registry the bill of costs and a copy thereof together with all necessary papers and vouchers.

The Reason For Allowing encl. 92

[7] My decision to allow encl. 92 turned upon my construction on how encl. 92 was to be applied.

[8] The plaintiff argues that the word "must" in O. 59 r. 20 must be construed as "shall" therefore denoting the mandatory nature of O. 59 r. 20. I disagree. See *Sarjit Singh Khaira v. Government of Sarawak* [1996] 1 CLJ 349 at p. 352 which concerned O. 59 r. 24 of the RHC 1980, but it is similarly applicable here in respect of the word "must" in the taxation proceedings. Therein it was held:

> In the light of all that, I am of the view that O. 59 r. 24(2) of the RHC should not be given strict interpretation as to give the word 'must' used therein its ordinary meaning of being mandatory in nature. The word 'must' therein is to be construed depending on the circumstances of each individual case or matter. The whole idea in taxation exercise is to satisfy the taxing officer before allowing the claim for costs as is appropriate in the circumstances. Therefore, it is wrong for the DR in this case to have declined jurisdiction over the three items solely on the ground that the government has failed to include the respective dates in the bill of costs. I therefore, direct that the matter be remitted back to the DR for her determination as regard the amount of costs to be allowed in respect of the said three items.

[9] Furthermore O. 59 r. 20 does not stipulate as to the time line for the production of the "copy thereof with all necessary papers and vouchers". Therefore, the purposive interpretation of these words would mean that they are to be produced as and when necessary.

[10] Order 59 r. 20 to my mind is therefore directory and not mandatory as it directs how a party entitled to tax his costs may do so. Order 59 r. 20 does not lay down any penalty for non-compliance and as such it is to my mind not mandatory. Moreover the taxing of costs is up to the party to whom costs were

awarded to do so. There is no compulsion upon a party to whom costs have been awarded to do so if that party neglects to do so or does not wish to do so. These all emphasizes the directory nature of O. 59 r. 20.

[11] Moreover, the deliberate insertion of the word "necessary" emphasizes the directory nature of O. 59 r. 20 and denotes a discretion vested in the party wishing to tax his costs as to which papers and vouchers it would deem necessary to support its claim for costs and to satisfy the court that the costs claimed ought to be allowed.

[12] To hold O. 59 r. 20 to be mandatory would cause great inconvenience and serve no practical purpose. Therefore it is my decision that it is not necessary for the defendants to have to also produce simultaneously at the Registry together with the Bill of Costs all the necessary papers and vouchers.

[13] Furthermore, if the court were to interpret O. 59 to mean that the taxing party must produce all necessary papers and vouchers in respect of all the items in the Bill of Costs during the filing of the Bill of Costs into court, then it would serve no useful purpose and would be inexpedient to do so because at the time of the filing of the Bill of Costs, the taxing party will not be able to know which particular items will be disputed by their opponent. It would be more expedient, convenient and only serve a useful purpose for the taxing party to produce all necessary papers and vouchers after the exchange of the marked copy with "P" or "Q" for the disputed items. It would lead to absurd result and inconvenience for it to be construed otherwise.

[14] A perusal of the Bill of Costs produced at the registry shows that there were a total of 256 items listed for taxing, itemized according to the nine enclosures listed in para. 4 above. It is my view that the practicability of the situation requires that only, and only if the plaintiff were to dispute any particular and specific item in the Bill of Costs would it then become incumbent and necessary for the defendants to furnish the papers and vouchers. It would not make sense for the defendant to have to furnish papers and vouchers for every item listed in the Bill of Costs if these items were not challenged. I cannot imagine the draftsman intending a construction other than the purposive one.

[15] Furthermore vouchers are to my mind only necessary in regard to disbursements. See O. 59, Item 37 in Appendix 1, in which it is specifically, mentioned "producing vouchers for disbursements". See also the article written by Dato Kamalanathan Ratnam entitled *"Taxation of Costs"* appearing at 1998 1 MLJ @ p. xli @ p. 1.viii in regard to out of pockets items. However, to my mind, the same consideration applies, that is, the vouchers need only be produced if the amount stated as disbursements or out of pocket items is disputed during the taxation. In practice, no one will produce all papers and vouchers before the exchange of a marked copy of the Bill of Costs. Before proceeding with the taxation, the parties must have exchanged marked copy with "P" or "Q" against any item which is in dispute in the Bill of Costs. If certain items were not disputed with the marked "P" or "Q" by the opponent, then the taxing party is not required to produce any proof to satisfy the undisputed items and the cost for such items would be deemed to have been agreed upon by the parties. See *Procam (Pte) Ltd v. Charles Jocelyn Tichborne Nangle & Anor* [1990] 4 MTC 208.

[16] I note that in the present case, the plaintiff has been given a copy of the Bill of Costs prior to the hearing. He has also forwarded to the defendants the marked copy of the Bill of Costs *vide* his letter dated 9 June 2011 (which has also raised the preliminary objection at the same time). Some of the out of pocket items like Item No. 4, 31, 40, 49 etc in the Bill of Costs (the payments for filing of documents) were not disputed by the plaintiff at all in the marked copy. These items are deemed to have been agreed by the plaintiff and it is not necessary for the defendants to produce any papers or receipts to prove the same.

[17] The plaintiff has applied by way of a PO to strike out encl. 90. I refer to O. 2 r. 3 which states that:

> A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[18] What substantial miscarriage of justice has the plaintiff suffered, I ask myself? The answer to my mind is an overwhelming "NONE". This by itself to my mind should have guided the SAR

not to allow the plaintiff's PO in the 1st instance. *Bank Simpanan Nasional v. Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1, *Grandeur Holdings Sdn Bhd v. Chong Kim Leong & Anor* [2005] 4 CLJ 700.

[19] Even if there were to have been a technical non-compliance of the procedural requirements stipulated under O. 59 r. 20, this court in administering O. 59 r. 20 shall have regard to the justice of the particular case and not only the technical non-compliance thereof. See O. 1A RHC; See also *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532 per Gopal Sri Ram J as he then was.

[20] The plaintiff's PO seen in its true light seeks just to delay the defendants' taxation of their costs. It is clearly and obviously lacking in basis, substance and merit.

Conclusion

[21] Based upon the above reasoning, it is my decision that upon a rehearing of the plaintiff's PO, the SAR erred when she allowed the plaintiff's PO and struck out encl. 90.

[22] I therefore reverse the decision of the SAR in regard to the PO and in doing so I dismiss the PO thereby allowing encl. 92 with costs which I fix at RM3,000 to be paid forthwith.

Order

[23] So ordered accordingly.